IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2018 OF 2006

Mrs Sana Yusuf Baugwala ...Petitioner

Vs.

The State of Maharashtra ...Respondent

Shri M.B. Shirsat for the Petitioner.

Ms S.V. Gajare, A.P.P for the Respondent.

CORAM : A. S. OKA, J.
DATE : OCTOBER 18, 2006.

P.C.:

1. By this Petition under Article 227 of the Constitution of India read with section 482 of the Code of Criminal Procedure, 1973, the Petitioner has challenged order dated 20th June, 2006 passed by the learned Metropolitan Magistrate, 15th Court, Mazgaon, Mumbai on a private complaint filed by the Petitioner. By the said order, the learned Magistrate directed that the complaint filed by the Petitioner be sent to the Senior Police Inspector of Nagpada Police Station, Mumbai under section 202 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the said Code of 1973). The learned Magistrate directed the police to investigate and to submit report on 16th August, 2006.

2. The Petitioner filed a private complaint alleging commission of offence under section 500 of the Indian Penal Code. The allegation of the Petitioner in the said complaint is that in a meeting of the Managing Concil of the Halai Memon Khandwani Jamat, a Public Trust held on 19th February, 2006, the accused made a false statement that a sum of Rs.50,000/- was paid to the Petitioner for the purpose of filing a Writ Petition in this court regarding transfer of the said Jamat to Wakf Board. The contention of the Petitioner is that the said false statement was made by the accused for the sole purpose of maligning and shattering the reputation of the Petitioner amongst the members of the Managing Council and the Jamat. According to the case of the Petitioner, due to the false and defamatory statement made by the accused in the said meeting, he received several calls from members of Jamat to inquire about the said allegation/ statement made by the accused. It is the case of the Petitioner that though a notice demanding unconditional apology was served to the accused, no reply was sent to the said notice by the accused.

3. The learned Advocate for the Petitioner submitted that the order impugned was passed by the

learned Magistrate without examining the witnesses of the Petitioner on oath as required by section 200 of the said Code of 1973. He pointed out that the learned Magistrate had only examined the complainant. He submitted that an order under section 202 of the said Code of 1973 cannot be passed without the complainant and all the witnesses of the complainant being examined on oath under section 200 of the said Code of 1973. He submitted that the order under section 202 of the said Code of 1973 could have been passed only after giving an opportunity to the Petitioner to examine the witnesses in support of the complaint. He submitted that the learned Magistrate had found existence of a prima facie case and therefore, he ought to have issued process on the complaint instead of directing investigation under section 202 of the said Code of 1973. The learned counsel placed reliance on the decision of the learned single Judge of the Andhra Pradesh High Court in the case of **Mirapa Suguan Vs. State of A.P. & Ors. [1999(4) Crimes Page 395]** in support of his submissions. The learned A.P.P supported the impugned order.

4. I have considered the submissions. The offence alleged by the Petitioner was under section 500 of the

Indian Penal Code. Obviously, the offence complained of is not triable exclusively by the court of Session.

5. Section 200 and section 202 of the said Code of 1973 read thus:

> "**200. Examination of complainant.-** A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:
>
> . Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-
>
> (a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or
>
> (b) if the Magistrate makes over the case

for inquiry or trial to another

Magistrate under s 192:

. Provided further that if the Magistrate makes over the case to another Magistrate under s 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

202. Postponement of issue of process.-(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under s 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

. Provided that no such direction for investigation shall be made,-

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under s 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

. Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section(1) is made by a person not being a police officer, he shall have for the investigation all the powers conferred by

this Code on an officer in charge of police station except the power to arrest without warrant".

Under section 200 of the said Code of 1973, a Magistrate is required to examine the complainant on oath and the witnesses present, if any. He can dismiss the complaint as provided in section 203 of the said Code of 1973. If he is of the view that there is sufficient ground for proceeding against the accused, the Magistrate can issue process as required by section 204 of the said Code of 1973. The third option is that the Magistrate can postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a Police Officer for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused. However, when it appears to the Magistrate that the offence complained of is triable exclusively by the court of Session or where the complaint has not been made by a court, a direction for investigation under section 202 of the said Code of 1973 shall not be passed unless the complainant and the witnesses present, if any, have been examined on oath under section 200. Sub-section 2 of section 202

provides that when learned Magistrate himself inquires into the case under sub-section 1, the Magistrate may, if he thinks fit take evidence of witnesses on oath. The proviso to sub-section 2 makes it mandatory for the learned Magistrate to call upon the complainant to produce all his witnesses and to examine them on oath when it appears to the Magistrate that the offence complained of is triable exclusively by the court of Session. Sub-section 2 operates only after an order is already passed under sub-section 1 of section 202. The proviso (a) to sub-section 1 of section 202 has no application in the facts of this case. The proviso (b) to sub-section 1 does not make mandatory for the learned Magistrate to grant opportunity in every case to the complainant to produce his witnesses. Under proviso (b), before passing a direction for investigation, the learned Magistrate is obliged to examine the complainant on oath under section 200 of the said Code of 1973. However, the learned Magistrate is required to examine the witnesses who are present, if any. Thus, it is not mandatory that before passing an order under sub-section 1 of section 202, the learned Magistrate must examine all the witnesses cited by the complainant as a condition precedent. However, he must examine the witnesses present, if any.

6. In the present case, admittedly the complainant has been examined under section 200 of the said Code of 1973. It is not the case of the Petitioner that any witnesses were present before the learned Magistrate at that time or any time before the order impugned was passed. Therefore, there is no merit in the first submission.

7. In the impugned order the learned Magistrate has observed that there is a prima facie evidence to investigate the case through police. The learned Judge has not made an observation that there is sufficient ground for proceeding against the accused.

8. The learned Magistrate has passed impugned order which is a discretionary order passed after examination of the complainant under section 200 of the said Code of 1973. It is not possible to find any fault with the said discretionary order passed by the learned Magistrate.

9. Reliance placed by the learned counsel for the Petitioner on the decision of the Andhra Pradesh High Court in the case of Mirapa Suguna (Supra) will not

help the Petitioner as in the facts of the case before the Andhra Pradesh High Court, the offence complained of was exclusively triable by the court of Session in as much as one of the offences complained was under section 304 of the Indian Penal Code. In view of this factual aspect, the learned single Judge of the Andhra Pradesh High Court held that proviso to sub-section 2 of section 202 of the said Code of 1973 is mandatory. Thus, the said decision will have no application to the facts of this case.

10. There is no merit in the Petition. Hence, the Petition is rejected.

JUDGE